IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1423

J. JEROME OLITT,

Petitioner,

against

FRANCIS T. MURPHY, JR., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents request that the petition for a writ of certiorari be denied. There are no issues truly presented which warrant review by this Court.

Opinions Below

The summary order and opinion of the Court of Appeals for the Second Circuit was dated November 16, 1978. It is noted on 591 F. 2d 1331 as a decision without a published opinion and is reproduced as Appendix "A" to the petition. The Court of Appeals denied a petition for rehearing on January 4, 1979. The opinion of the District Court is reported at 453 F. Supp. 354 and is reproduced as Appendix "B" to the petition.

Jurisdiction

The jurisdiction of this Court to review the order below rests on 28 U.S.C. § 1254(1).

Questions Presented on the Petition

1. Did the Court of Appeals (and the District Court) correctly apply *res judicata* to petitioner's case and does this warrant review by the Supreme Court?

2. Was petitioner correct in seeking to invoke *England-Pullman* abstention in respect to the state proceeding leading to his suspension from the bar when he never had a federal court action pending when the state proceeding was commenced?

Facts

The facts of the case are set forth by the District Court at 453 F. Supp. at 355-358. Petitioner is a suspended attorney in New York who instituted numerous federal actions challenging the anticipated suspension while state proceedings were going forward. Petitioner's statement of the facts (Pet., pp. 4-10) is his own, peculiar version of what he was doing, sometimes *pro se,* sometimes represented by counsel. As noted, the Court of Appeals published no opinion, and "affirmed substantially" on the District Court opinion.

Reasons Why the Writ of Certiorari Should be Denied

There can be no doubt that petitioner's reliance on *England* v. *Louisiana Board of Medical Examiners,* 375 U.S. 411 (1964) is misplaced. His claim that after the start of state disciplinary proceedings he could enter the federal courts because he "reserved" his federal claims is absurd. His numerous prior federal actions were dismissed due to *Younger* v. *Harris,* 401 U.S. 37 (1971). This makes *England* inapplicable.

The reason *England* has no relevance to petitioner's case is that he never had a pending suit in federal court subject to *England* abstention (unsettled question of state law). Here the plaintiff was barred completely from the federal court due to *Younger* abstention (pending state court proceeding). The difference is significant and clearly set forth in *Juidice* v. *Vail,* 430 U.S. 327, 347-348 (STEWART, J., dissenting) (1977). As Justice Stewart notes, *Pullman**-*England* abstention does not altogether foreclose access to the federal courts. Of course *Younger* abstention, the only type ever applied to petitioner, *does,* except for an appeal to the United States Supreme Court. Furthermore, petitioner never presented an unsettled question of state law to the state or federal courts.

Petitioner's claim that the decision of the Court of Appeals herein conflicts with *Getty* v. *Reid,* 547 F. 2d 971 (6th Cir. 1977), petition, p. 18, is without merit. That case simply was a narrow procedural decision under the three-judge court statute (28 U.S.C. §§ 2281, 2284), now repealed. The proper grounds for such a court to dismiss such an application on an attorney's federal complaint was the issue there. Left open by the decision was a First Amendment claim. It did not see federal appellate review of state court decisions as involved.

For a discussion of *Getty* as to what was and was not decided, see *Maurice* v. *Board of Directors,* 450 F. Supp. 755, 759-760 (E.D. Va. 1977).

As to petitioner's basic case on the merits, his challenge to use of immunized testimony in attorney disciplinary matters, see 62 ALR 2d 1145 which states that the universal rule is to allow such use.

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* *Railroad Commission of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941).

The petitioner seeks to raise an insubstantial federal procedural question when his underlying claim is without any merit. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 606, n. 18 indicates that *res judicata* does apply to petitioner's case, where he never had a proper *England* abstention order entered and did litigate his federal claims in state court. *England* abstention can never be unilaterally invoked by the plaintiff (petitioner); it must be the subject of a federal court order of abstention.

CONCLUSION

The petition should be denied.

Dated: New York, New York
May 21, 1979

Respectfully submitted,

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